LIBRARY 73-810
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED
NOV 23 1973
MICHAEL RODAK, JR., CLERK

October Term, 1973 No

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

WARREN FELTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

JAMES T. RANNEY
Assistant District Attorney
Deputy Chief, Appeals Division
DAVID RICHMAN
Assistant District Attorney
Chief, Appeals Division
RICHARD A. SPRAGUE
First Assistant District Attorney
ARLEN SPECTER
District Attorney

666 City Hall
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Involved	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	
The principle established by this Court which permits an accused to be tried *in absentia* when he absconds after the trial has begun should (as several other courts have done), be extended to cases where an accused wilfully and knowingly absconds just prior to the beginning of trial, there being no difference of constitutional dimensions between the two situations since the same rights are being waived in each case.	4
Conclusion	7
Appendix	8
A. Opinion of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, filed August 16, 1972.	9
B. Opinion of the Superior Court of Pennsylvania, reported as *Commonwealth v. Felton*, 224 Pa. Superior Ct. 398, 307 A.2d 51 (1973).	14
C. Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.	19
D. Respondent's Answer to Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.	23
E. Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal, dated September 10, 1973.	28

TABLE OF CITATIONS

Federal Cases:

	Page
Arizona v. Hunt, 408 F.2d 1086 (6th Cir. 1969), *cert. denied*, 396 U.S. 845	5
Barker v. Wingo, — U.S. —, 92 S. Ct. 2182 (1972)	6
Diaz v. United States, 223 U.S. 442 (1912)	4
Illinois v. Allen, 397 U.S. 337 (1970)	4
United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972), *cert. denied*, 409 U.S. 1063 (1973)	5

State Cases:

Commonwealth v. Estep, 50 D. & C. 2d 200 (York Co. Pa. 1970)	5
Commonwealth v. Felton, 224 Pa. Superior Ct. 398, 307 A.2d 51 (1973)	1
State v. Tacon, 488 P.2d 973 (Ariz. 1971), *cert. denied*, — U.S. —, 12 Cr. L. Rptr. 3159 (1973)	5

IN THE

Supreme Court of the United States

October Term, 1973 No. —

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

WARREN FELTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania, through the District Attorney of Philadelphia, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, denying allocatur on a decision of the Superior Court of Pennsylvania, said denial having been entered on September 10, 1973.

OPINIONS BELOW

The order of the Court of Common Pleas of Philadelphia denying Respondent's motion for a new trial and an arrest of judgment is unreported and is attached as Appendix A. The opinion of the Superior Court of Pennsylvania reversing the lower court is reported as *Commonwealth v. Felton*, 224 Pa. Superior Ct. 398, 307 A.2d 51 (1973) and is attached as Appendix B. The order of the Supreme Court of Pennsylvania denying allocatur is unreported and is attached as Appendix E.

JURISDICTION

The order of the Supreme Court of Pennsylvania denying allocatur issued on September 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION INVOLVED

Is there any difference of constitutional dimensions between trial *in absentia* of an accused who absconds shortly or immediately after his trial begins and one who wilfully and knowingly absconds immediately prior to the time when he knows his trial is scheduled to begin?

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . [and] to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Respondent Warren Felton was tried by the Honorable Leo Weinrott and a jury and found guilty of the aggravated robbery and burglary of a supermarket. He had been indicted in December, 1970. On January 21, 1971, the case was listed for trial arraignment, at which time trial was scheduled for February 23, 1971. The case was continued and private counsel entered on appearance on March 24, 1971, at which time the case was further continued to April 20, 1971, at the request of defense counsel. On April 12, 1971, Respondent was released on bail of $4000. On April 20, the case was continued to May 27, 1971, because defense counsel was in Canada. On May 26, 1971, the case was continued at the request of defense

counsel to June 1, 1971. On May 28, defense counsel requested and was denied a continuance of thirty days (the request apparently being based upon an excuse of illness that was found to be spurious. (N.T. 19-20). On June 1, defense counsel appeared with the defendant in Courtroom 625 in City Hall, Philadelphia, and requested a continuance of forty-five days which was denied. Thereupon, the case was sent for trial from the "calendar room" (Room 625) to Courtroom 654 on the same floor of City Hall. The Commonwealth witnesses and the assistant district attorney assigned to try the case proceeded to Room 654. Respondent was (as reported later by his attorney) very upset at being finally ordered to trial and, when left alone for a short time by his attorney, he absconded from City Hall. At 10:00 p.m. that evening, he called his attorney at home. (N.T. 16-17). His attorney tried to persuade him to come in and told him that the trial was set for 10:30 a.m. the next morning. (N.T. 17-19). Respondent would not tell his attorney where he was at the time of the call (N.T. 18) and failed to appear in court on June 2. Eight county detectives proceeded to search for the defendant, but he could not be found. On the evening of June 2, defendant's mother informed the warrant unit detectives that they should not come again without a warrant and that defendant would not surrender himself. (N.T. 32). On June 3, 1971, the Commonwealth witnesses and the assistant district attorney again appeared in court, but defense counsel was absent due to a personal ailment. (N.T. 31). Finally, on June 7, 1971, trial was begun without the defendant being present over the objection of his attorney. (N.T. 42-44). Respondent was found guilty of burglary and aggravated robbery on June 11, 1971.

Following the denial of post-trial motions and Respondent's apprehension on a charge of auto larceny, Respondent was sentenced on October 18, 1972, to five to twenty years imprisonment.

Respondent filed a successful appeal in the Superior Court of Pennsylvania, and the Supreme Court of Pennsylvania denied *allocatur* on September 10, 1973.

REASONS FOR GRANTING THE WRIT

The principle established by this Court which permits an accused to be tried *in absentia* when he absconds after the trial has begun should (as several other courts have done) be extended to cases where an accused wilfully and knowingly absconds just prior to the beginning of trial, there being no difference of constitutional dimensions between the two situations since the same rights are being waived in each case.

This Court has clearly held that an accused can be tried *in absentia* where he voluntarily absents himself after the trial has begun in his presence. *Diaz v. United States*, 223 U.S. 442 (1912). Accord, *Illinois v. Allen*, 397 U.S. 337, 349 (1970) (Brennan, J., concurring).

The question now sought to be raised is whether this principle may constitutionally be extended to apply to a case where the accused appears in a trial assignment room ("calendar" room), is ordered by the calendar judge to appear for the beginning of trial in a nearby courtroom, and thereafter voluntarily absents himself under circumstances that leave no doubt but that the absention was done wilfully.

The Superior Court of Pennsylvania recognized that an accused could be tried *in absentia* where he voluntarily absconded after his trial had begun, but purported to find a difference of constitutional dimension between that situation and one wherein the accused absconds immediately prior to trial. The Court feared that somehow such an extension of the *Diaz* rule would result in prosecution of "fugitives who are unaware of the charges against them . . ." 224 Pa. Superior Ct. at 403, 307 A.2d at 53. The Court further stated that, "no court has ever held that a defendant waives his right to be present at trial by failing to appear on the date scheduled for trial." 224 Pa. Superior Ct. at 402, 307 A. 2d at 53.

The Court was clearly wrong in both of the above-

quoted assertions. Firstly, the Court's speculation that fugitives would be unaware of the charges against them was totally unwarranted under the facts of this case since there was a clear showing that Respondent knew that he was supposed to go to trial but purposely refused to come. Indeed, this much was undisputed by Respondent's defense attorney.

Secondly, the Commonwealth in its brief before the Superior Court cited a number of cases where courts had held that failure of the accused to appear for trial could properly be construed as a waiver of the right to presence at trial. The cases cited were as follows: (1) *Arizona v. Hunt*, 408 F. 2d 1086 (6th Cir. 1969), *cert. denied*, 396 U.S. 845; (2) *Commonwealth v. Estep*, 50 D. & C. 2d 200 (York Co. Pa. 1970); (3) *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972), *cert. denied*, 409 U.S. 1063 (1973); and (4) *State v. Tacon*, 488 P. 2d 973 (Ariz. 1971), *cert. denied*, — U.S. —, 12 Cr. L. Rptr. 3159 (1973). In *United States v. Tortora*, *supra*, the Second Circuit stated:

> We . . . hold that a defendant may waive his right to insist that his trial begin only in his presence. When a defendant has pleaded to the charges against him and knows that the trial of the charges is to begin on a day certain, the trial may start in his absence if he deliberately absents himself without some good reason for staying away. Under the circumstances of this case, Santoro's failure to attend court on August 16, when he knew that a jury would be selected and evidence presented, was a knowing and voluntary waiver of his right to be present at the trial.
>
> * * *
>
> The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried. [citations

> omitted]. When a trial judge designates a date for trial, the defendant's obligation is to appear ready in court on that date.

Id. at 1208. The Court went on to note that to hold otherwise would mean that,

> the disposition of criminal cases would be subject to the whims of defendants who could frustrate the speedy satisfaction of justice by absenting themselves from their trials . . . the greater the delay between the charge and the trial date, the greater the likelihood that witnesses will be unable to appear or that their memories will have faded and their testimony will be less convincing. That a defendant can be convicted of bail jumping if he fails to appear at trial is not sufficient to vindicate the public interest. The public is entitled to a speedy disposition of the criminal charges absent a finding by the court that good reasons exist for delay.

Id. at 1208-1209.

The concern of the Second Circuit in *Tortora* for the societal interest in speedy trial when memories are fresh and witnesses available has been recently voiced by this Court in *Barker v. Wingo*, — U.S. —, — 92 S. Ct. 2182, 2186-2187 (1972), and is fully applicable to this case, where Respondent can reasonably be said to have been engaged in a variety of delaying tactics that he had employed in a prior trial where he ran through numerous defense attorneys before finally going to trial. (N.T. 10-16).

There is no dispute as to the fact that Respondent Felton voluntarily and knowingly waived his right to be present at trial. Nor was the waiver any different from that found in *Diaz* or any case where an accused happens to abscond shortly after his trial begins. All of the rights enumerated by the Superior Court of Pennsylvania—the right to be present during jury selection, the right to confront witnesses, the right to be present during the

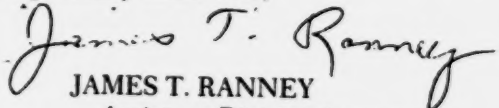
charge to the jury, and the right to be present during the pronouncement of the verdict (224 Pa. Superior Ct. at 403 n.1, 307 A. 2d 53 n.1)—would be waived by a person who absconded shortly after the trial began as well as by one in Respondent's position. Thus, for constitutional purposes, there is no difference between one who absconds minutes before trial begins and one who absconds minutes after trial has begun.

Thus, the lower courts in this case have improperly held that the Constitution mandates a distinction between the above two situations. This erroneous decision conflicts with those of several other courts, including the United States Courts of Appeals for the Sixth and Second Circuits.

CONCLUSION

For the above reasons, the Commonwealth of Pennsylvania respectfully requests that this Court issue a Writ of Certiorari for review of the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,



JAMES T. RANNEY
Assistant District Attorney
Deputy Chief, Appeals Division
DAVID RICHMAN
Assistant District Attorney
Chief, Appeals Division
RICHARD A. SPRAGUE
First Assistant District Attorney
ARLEN SPECTER
District Attorney

APPENDIX

APPENDIX A

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
v.
WARREN FELTON

December Sessions, 1970

Nos. 1420 to 1422

OPINION

WEINROTT, J.:

Defendant, Warren Felton, was tried on June 10, 1971, in absentia before this Court and a jury on Bills of Indictment No. 1420, charging Burglary; No. 1421, Aggravated Robbery; No. 1422, Carrying concealed deadly weapon and unlawfully carrying a firearm without a license, all of December Sessions, 1970. The jury's verdict was guilty on all Bills.

Post trial motions were filed, and in the trial as well as in oral argument, defendant's counsel, (and correctly so), defined the issue as whether or not a defendant free on bail may be tried for a non-capital felony where his absence is due to his own voluntary act. It is important to note, of course, that the above-captioned Bills of Indictment relate to non-capital felonies; that defendant was out on bail; that he was represented by defense counsel; that when the case was called for trial, both defense counsel and defendant appeared in the Assignment Room, 625 City Hall, and that defendant communicated with his defense counsel; that after assignment from Room 625 for trial in Room 654, a conference was held in the Trial Court's chambers; that defendant was outside in the corridor of the courtroom, and

that he was advised by an Assistant District Attorney, after the conference in chambers, to report to the courtroom where the trial would begin.

Defendant did not appear in Room 654 for trial and voluntarily absented himself therefrom, but his defense counsel remained. At arraignment the plea of not guilty was entered, and defendant's attorney selected a jury and tried the case to the end, including cross-examination of all witnesses and making an opening and closing address.

Basically, the substantive crimes were committed on November 30, 1970, at an A & P Supermarket, 1315 E. Washington Lane, Philadelphia, Pennsylvania. Defendant entered the store, pulled out a revolver and announced: "Allright, this is a hold-up; nobody play hero and nobody will get hurt." There was no question about the identity of defendant by the Manager of the supermarket (N.T. 45). Defendant and an accomplice then rounded up all the employes. Defendant then forced one into the office to open the safe. In the meantime, he ordered all others into a freezer box, and after having taken the money from the safe announced, "We're leaving the City and they'll never catch us. If you identify me in a mug shot I'll come back and kill you." The amount taken was approximately $3200.00.

We have found several cases discussing peripheral issues, and though none speaks directly to the pivotal one involved here, the logic of them compels us to answer that under the circumstances of this case, the defendant has waived his right to be present. We do not and cannot deny the absolute right of the defendant to be present at every stage of the proceeding, but the factual situation involved in this case demands a determination of whether that right has been waived.

For instance, in *Commonwealth ex rel. Milewski v. Ashe*, 303 Pa. 596, 70 A.2d 625, former Chief Justice Maxey ruled that where a defendant in a felony case is not in custody, his absence from the courtroom when the verdict is announced may be construed as a voluntary waiver on his part of his right to be present. Similarly, in *Common-*

wealth ex rel Hancock v. Maroney, 177 Pa. Superior Ct. 133, 110 A.2d 923, a selection of a jury in defendant's absence when the defendant was out on bail, was held to be a voluntary waiver when counsel was present. In *Commonwealth v. Bova*, 180 Pa. Superior Ct. 369, the absence of a represented defendant on bail in a non-capital felony was likewise held to be a voluntary waiver when the verdict was received in his absence.

Several other cases have concerned themselves with situations where the defendant was held not to have waived his right to be present. For instance, in *Commonwealth v. House*, 6 Pa. Superior Ct. 92, at 111, defendant was held not to have voluntarily waived his right after court adjourned for the day and the court called the jury in and gave additional instructions in the absence of defendant and his counsel. In *House*, language appears from *Prine v. Commonwealth*, 18 Pa. 103, to the effect that:

> "It is undoubtedly error to try a person for a felony in his absence even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence."

However, the Supreme Court in *Lynch v. Commonwealth*, 88 Pa. 189, modified *Prine* in non-capital felonies, and the exception of voluntary waiver was created. *Lynch*, Supra, explains that *Prine* spoke of felonies once considered capital. At common-law larceny had never been considered capital. The historical explanation of *Prine*, Supra, lay in the fact that that court had previously explained its position in *Jacobs v. Commonwealth*, 5 S. & R. 315, in which it was held that upon an indictment for larceny, it is not necessary that arraignment should appear of record. It was said:

> "In all misdemeanors a defendant may appear and plead by attorney; but as no one can be convicted

> of a *capital* offense in his absence, it necessarily results that in trials for offenses of that grade, it should appear by the record that the defendant was personally present."

Thus, the distinction for capital versus non-capital felonies. *Lynch* thereafter considers common-law distinctions of high misdemeanors, felonies and capital crimes and discusses when a defendant may voluntarily waive his rights.

In *Commonwealth v. Gabel & Gabel*, 79 Pa. Superior Ct. 59, citing *Commonwealth v. House*, Supra, the conduct of the defendants was held not to be a waiver. There, the court began a trial in their absence by entering a plea of not guilty and impaneling a jury and taking the Commonwealth's case in chief. An adjournment was then had with an admonition to bring defendants in the following day. They appeared the next morning and complained that the case had not been scheduled for trial on the preceding day; that they had no notice that it would be called for trial. The case then continued, the jury was charged and the verdict of guilty entered. A new trial was awarded.

It has been held with authority that in felony cases, not capital, it is the rule in most jurisdictions, generally on the theory that the rule requiring the accused to be present at the trial is essentially for his benefit, that the accused may waive his right to be present, even though the right is of constitutional origin. Such a waiver must be clear and unequivocal, and must be of an affirmative and positive nature. It may be manifested by express language or conduct. The right to be present may be waived by a failure to assert it in apt time and it has been held in some instances under statutory provisions that the right may be waived by the accused absconding or voluntarily absenting himself from the trial: 23 C.J.S. 899, 900.

We therefore hold that under the circumstances presented in this case, that the conduct of defendant constituted a voluntary waiver of his right to be present.

In addition to the Motions in Arrest of Judgment and for a New Trial, filed by defense counsel, defendant personally filed:

(1) Application for Writ of Habeas Corpus,
(2) Motion for Judgment of Acquittal;
(3) Motion to Stay Enforcement of Judgment,
(4) Motion for a Change of Judge.

The above motions speak principally to the issues discussed herein, and are likewise dismissed.

Obviously, the application for the Habeas Corpus cannot be used as a substitute for an appeal. Indeed, the merits of defendant's conduct are the subject of the present motions.

The Motion for Judgment of Acquittal is considered as a motion in arrest and has been dealt with heretofore in this opinion.

The Motion to Stay Enforcement of Judgment is premature since judgment of sentence has not been imposed, and the Motion for Change of Judge is considered as a motion to disqualify and is refused as lacking in merit.

In view of the foregoing, we enter the following:

ORDER

AND NOW, TO WIT, this 16th day of August, A.D. 1972, defendant's Motions for New Trial and in Arrest of Judgment are denied and defendant is ordered down for sentencing on a date to be fixed by the Trial Commissioner.

BY THE COURT:

S/ [illegible]

J.

APPENDIX B

IN THE
SUPERIOR COURT OF PENNSYLVANIA
Philadelphia District

October Term, 1972 Nos. 58, 59

COMMONWEALTH OF PENNSYLVANIA

v.

WARREN FELTON,

Appellant

OPINION PER CURIAM, June 14, 1973:

This appeal raises the question of whether or not a trial may be conducted in the absence of the defendant.

The appellant, Warren Felton, was charged with burglary, aggravated robbery, and carrying a concealed deadly weapon. On June 1, 1971, the appellant, who was free on bail, and his counsel appeared before the Honorable Herbert R. CAIN, Jr., and requested a continuance on the ground that the appellant had been ill and had been unable to communicate with his attorney and aid in the preparation of his case. Furthermore, the appellant contended that his illness would make his attendance at trial difficult. Judge CAIN refused to grant appellant's request for a continuance and ordered appellant to appear in Room 654 City Hall, Philadelphia for trial before the Honorable Leo WEINROTT.

Rather than appear for trial, the appellant disappeared without ever setting foot in Judge WEINROTT's courtroom. Judge WEINROTT issued a bench warrant for appellant and adjourned the proceedings for the day. When the appel-

lant was not apprehended, the Judge engaged in numerous discussions with the District Attorney and defense counsel before electing to proceed with the trial in the absence of the defendant. The decision to try the defendant in absentia was made over the strenuous objection of defense counsel.

The origin of the modern right to be present at one's trial is devolved from the ancient common law requirement that no trial for a felony could take place in the absence of the defendant; neither could the defendant waive his right to be present at trial because his absence would deprive the court of jurisdiction in the matter. 61 J. Crim. L. 327 (1970). In the late 1800's, the Supreme Court of the United States enunciated the rule that where a defendant has been charged with the commission of a felony, nothing may be done in the absence of that defendant. *Lewis v. United States*, 146 U.S. 370, 372 (1892). Chief Justice GIBSON of the Pennsylvania Supreme Court most clearly and unequivocally expressed this principle of law over 120 years ago: "It is undoubtedly error to try a person for a felony in his absence, *even with his consent*. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. *Never has there heretofore been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record* . . . when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential: for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel cannot do for him. It is unnecessary, however, to speak of delegated authority; for the *right of a prisoner to be present at his trial is inherent and inalienable*." *Prine*

v. The Commonwealth, 18 Pa. 103, 104-105 (1851) (emphasis added).

The absolute tenor of the rule that a trial may not be conducted in the absence of the defendant has been eroded over the years. In *Diaz v. United States*, 223 U.S. 442 (1912), the Supreme Court ruled: "But, where the offense is not capital and the accused is not in custody, the prevailing rule has been that if, after the trial has begun *in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." 223 U.S. at 455 (emphasis added).

The question of whether or not a defendant has a right to be present at all stages of his trial was most fully discussed by Justice Benjamin CARDOZO in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), overruled on other grounds *Malloy v. Hogan*, 378 U.S. 1 (1964): "[I]n a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial to the fulness of his opportunity to defend against the charge." 291 U.S. at 105-106. For example, the courts have held that a defendant must be present during the jury selection process, *Hopt v. Utah*, 110 U.S. 574 (1884); *Lewis v. United States*, supra: during the presentation of additional instructions to the jury, *Shields v. United States*, 273 U.S. 583 (1927); and during the pronouncement of the verdict, *Commonwealth ex rel. Milewski v. Ashe*, 363 Pa. 596, 70 A. 2d 625 (1950). Most importantly, "The right of the accused to confront all witnesses against him during the course of the proceedings is *unquestioned*." *Pointer v. Texas*, 380 U.S. 400 (1965); *Commonwealth v. Hoss*, 445 Pa. 98, 113, 283 A. 2d 58, 67 (1971) (emphasis added).

In the instant matter, the appellant was never present in the courtroom during his trial. The jury was selected, the evidence was offered, and the verdict was rendered in

the absence of the accused. The appellant was present in the assignment room on the day that the trial was scheduled to begin, but he violated the conditions of his bail by failing to appear in the courtroom to which his case was assigned. Although a defendant waives his right to be present at trial by voluntarily refusing to appear before the court once the trial has begun, *Commonwealth v. Diehl*, 378 Pa. 214, 217, 107 A. 2d 543-545 (1954), no court has ever held that a defendant waives his right to be present at trial by failing to appear on the date scheduled for trial. Indeed, *Diaz v. United States*, supra, specifically states that the defendant may waive his right to be present at trial by voluntarily absenting himself from a trial which *began in his presence*.

Although there may be portions of the trial where a defendant's presence does not have "a relation, reasonably substantial to the fulness of his opportunity to defend against the charge," *Snyder v. Massachusetts*, supra, there is no question that an accused who is absent from an entire trial has been substantially prejudiced in presenting his defense.[1] This case is distinguishable from a proceeding where the defendant voluntarily absents himself from the courtroom subsequent to the initiation of the proceeding. If a mistrial were declared whenever a defendant voluntarily absents himself from the courtroom during trial, the courts would encourage defendants to refuse to appear whenever they expect the judge or jury to render a verdict of guilty. Such an absence would guarantee the defendant another opportunity to be acquitted. These circumstances

---

1. He lost his right to be present during the selection of the jury. *Hopt v. United States*, supra, *Lewis v. United States*, supra; he was not present during the charge to the jury, *Shields v. United States*, supra; and he was not present during the pronouncement of the verdict, *Com. ex rel. Milewski v. Ashe*, supra. Most importantly, he did not have an opportunity to confront the witnesses against him, *Pointer v. Texas*, supra; *Comm. v. Hoss*, supra; this right is explicitly guaranteed by Article 1, section 9 of the Pennsylvania Constitution.

do not attach to a case where the defendant does not appear on the date scheduled for trial. While the appellant's absence delayed the administration of justice, the appellant would not have received a second chance at acquittal if the trial had been postponed until his apprehension. If the waiver rule were extended to include actions taken by an accused prior to trial, fugitives who are unaware of the charges against them could be tried in absentia. This could prevent the system from reaching a just and fair verdict. Both the United States and Pennsylvania Constitutions guarantee that an accused has a right to be present at trial; this right cannot be waived by an accused's actions prior to trial.

The order of the lower court is reversed and the case remanded for a new trial.

APPENDIX C

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA — Miscellaneous Docket

v.

WARREN FELTON — No.—

COMMONWEALTH'S PETITION FOR ALLOWANCE OF APPEAL

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SAID COURT:

The COMMONWEALTH, by MILTON M. STEIN, Assistant District Attorney, Chief, Appeals Division, of Philadelphia County, respectfully requests allowance of an appeal to this Court in the above case, for the following reasons:

1. This case concerns the trial *in absentia* of a defendant who has voluntarily absented himself. Although the right to try a person *in absentia* has long been recognized, and is explicit in Pa. R. Crim. Pro. 1117, the Superior Court in this case has set forth a distinction between a defendant's absence prior to trial and once trial has commenced. This ruling is in apparent conflict with R. Crim. Pro. 1117, and the Commonwealth therefore believes it is necessary for this Court to resolve the rule as to when a defendant may be tried *in absentia*.

2. Warren Felton was tried by the Honorable Leo Weinrott and a jury and found guilty of the aggravated robbery and burglary of a supermarket. He had been indicted in December, 1970; on June 1, 1971, defendant

and his counsel appeared for trial, a further request for continuance was refused, and the case was assigned to a specific courtroom for trial to commence that day. Between the list room and the trial courtroom, the appellant absconded. Diligent effort to find appellant was unsuccessful; trial commenced the next week, and the defendant was tried *in absentia*.

3. Rule 1117 of the Rules of Criminal Procedure provides:

> *Rule 1117. Presence of the Defendant.*
>
> (a) The defendant shall be present at *the arraignment, at every stage of the trial including the impanelling of the jury* and the return of the verdict, and at the imposition of sentence, *except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial* including the return of the verdict. (Emphasis supplied).

4. The Superior Court has recognized that: "If a mistrial were declared whenever a defendant voluntarily absents himself from the courtroom during trial, the courts would encourage defendants to refuse to appear whenever they expect the judge or jury to render a verdict of guilty. Such an absence would guarantee the defendant another opportunity to be acquitted" (slip opinion, pp. 4-5). But these circumstances are the same when a defendant, by deliberately refusing to appear, frustrates every effort to commence the trial, and delays or obstructs the proceedings against him to the point that evidence cannot be presented. Moreover, the Superior Court's fear that trials *in absentia* where the trial did not actually commence to the point of impanelling a jury might result in prosecution of "fugitives who are unaware of the charges against them" (slip opinion, p. 5) is unfounded when a clear showing is required that the defendant knew of the trial date and nevertheless voluntarily absented himself. Nor is the

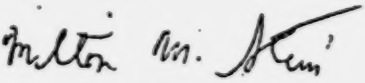
Superior Court's distinction between actual commencement of trial and simply calling the case for trial constitutionally compelling; virtually identical rights are being waived by the voluntarily absent defendant in either case.

5. The Commonwealth respectfully believes that the Superior Court is incorrect in its conclusion that "no court has ever held that a defendant waives his right to be present at trial by failing to appear on the date scheduled for trial" (slip opinion, p. 4). The Commonwealth discussed such precedent in its brief. *Commonwealth v. Estep*, 50 D&C 2d 200 (1970) (p. 11 n. 11 of Brief); *Arizona v. Hunt*, 408 F.2d 1086 (6th Cir. 1969), cert. den., 90 S. Ct. 81 (p. 10 n. 10 of Brief); *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972), cert. den., — U.S. — (pp. 12-14 of Brief); and *State v. Tacon*, 488 P.2d 973 (Ariz. 1971), cert. den., — U.S. — (1973) (pp. 14-15 of Brief).

6. In any event, and especially in light of the injustices that can be occasioned by plain defiance of judicial efforts to provide for the prompt trial of criminal cases, there is a need for this Court to analyze and set forth the law as to when trial *in absentia* is necessary and permissible.

WHEREFORE, it is respectfully requested that this Court grant leave to appeal in the above-entitled case.

Respectfully submitted,



MILTON M. STEIN,
Assistant District Attorney,
Chief, Appeals Division

COMMONWEALTH OF PENNSYLVANIA :
: SS:
CITY AND COUNTY OF PHILADELPHIA :

MILTON M. STEIN, being duly sworn according to law deposes and says that he is an Assistant District Attorney in and for the County of Philadelphia, and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information, and belief.

Sworn to and subscribed
before me this 19th
day of June A.D.
1973.

Milton M. Stein

Beatrice S. Williams

Notary Public

My Commission Expires December 28, 1974.

APPENDIX D

IN THE
SUPREME COURT OF PENNSYLVANIA
For the Eastern District

COMMONWEALTH OF PENNSYLVANIA	Miscellaneous Docket
	No.
v.	
WARREN FELTON	(Superior, Oct. 1972, #58, 59 C.P., Dec., 1970, #1420-1422)

DEFENDANT'S ANSWER TO COMMONWEALTH'S PETITION FOR ALLOWANCE OF APPEAL

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SAID COURT:

The Defendant, by William J. Brady, Jr., Esquire, his attorney, respectfully answers the Commonwealth's Petition for Allowance of an Appeal.

1. It is agreed that this case concerns a trial in absentia of the defendant. Whereas the Commonwealth points to Pa. R. Crim. Pro. 1117 and talks of the right to try a defendant where he is voluntarily absent, the defendant wishes to point out that under Rule 317 an arraignment is mandatory and shall take place at least ten days before trial. In the present case, no arraignment of the defendant had taken place when this trial began in his absence.

2. Defendant refers to Rule 317 where an arraignment ten days before the trial is mandatory and since this had not taken place, defendant and his attorney were not aware that the trial would start immediately when they appeared in the list room for a continuance.

3. Admitted, but it is averred that Rule 317 must be followed prior to the effective enforcement of Rule 1117, and it is also averred that Rule 1117 codifies the common law of Pennsylvania and the judicial interpretation of what rights a defendant has in regard to a fair trial. The Commonwealth wishes to read this rule as the grounds by which the Commonwealth could try a defendant.

4. It is submitted that the opinion of the Superior Court should be read in its totality rather than dissecting it and thereby losing the import of the facts of this present appeal and how they are judicially determined, and a waiver of substantial constitutional rights must be clear and unequivocal, Evans v. United States, 284 F.2d 393 (1960).

5. It should be noted that no trial date had been set in this case when the defendant appeared in the list room. In Commonwealth vs. Estep, 50 D&C 2d 200 (1970), the case had to do with a traffic violation and involved a non-jury trial of a misdemeanor.

The Commonwealth cites the case of Arizona v. Hunt, 408 F.2d 1086 (6th Cir. 1969), in which the court rules that the defendant voluntarily absented herself and thus waived her right to be present. However, the circumstances in this case are a great deal different than Commonwealth v. Felton. The defendant Hunt had been absent from numerous hearings from February 1, 1966 to April 25, 1967, during which time her attorney had the trial continued seven times. In order to have defendant Mrs. Hunt present, the state of Arizona began proceedings to have Mrs. Hunt extradited from the state of Michigan. Another continuance would then have occurred except that her husband and co-defendant objected, seeking a speedy trial and the Arizona court then denied the Motion for Continuance and tried and convicted Mrs. Hunt in absentia. The situations are extremely different as defendant Hunt repeatedly refused to appear stating health reasons, though her illnesses were not substantiated by doctors' reports and

defendant Hunt was being tried with a co-defendant. Defendant Felton, on the other hand, was being tried alone and had never absented himself before, and in fact had been at all prior hearings. In Arizona v. Hunt to continue the trial in order to insure Mrs. Hunt's presence by extraditing her from Michigan, would have been a long process which would have hurt the co-defendant and her repeated absences showed that she had no intention of presenting herself in Arizona.

The Commonwealth also cites State v. Tacon, 448 P.2d 973 (Ariz. 1971), as precedent where the court has held that a defendant can waive his right to be present at trial. However, in the State v. Tacon case the defendant Tacon knew that his trial was scheduled for March 31, 1970, and was told on March 1, 1970 that if he did not appear on that date that the trial would proceed in his absence.

The Superior Court of Pennsylvania summed up the present fact situation in its opinion by concluding in the last paragraph:

> . . . This case is distinguishable from a proceeding where the defendant voluntarily absents himself from the courtroom subsequent to the initiation of the proceeding. If a mistrial were declared whenever a defendant voluntarily absents himself from the courtroom during trial, the courts would encourage defendants to refuse to appear whenever they expect the judge or jury to render a verdict of guilty. Such an absence would guarantee the defendant another opportunity to be acquitted. These circumstances do not attach to a case where the defendant does not appear on the date scheduled for trial. While the appellant's absence delayed the administration of justice, the appellant would not have received a second chance at acquittal if the trial had been postponed until his apprehension. If the waiver rule were extended to include actions taken by an accused prior to trial, fugitives who are unaware of the charges against them

could be tried in absentia. This could prevent the system from reaching a just and fair verdict. Both the United States and Pennsylvania Constitutions guarantee that an accused has a right to be present at trial; this right cannot be waived by an accused's actions prior to trial."

WHEREFORE, it is respectfully requested that this Court deny leave to appeal in the above-entitled case.

Respectfully submitted,

William J Brady Jr (S)

WILLIAM J. BRADY, JR.
Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF PHILADELPHIA: SS

WILLIAM J. BRADY, JR., Esquire, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

William J. Brady, Jr. (S)
WILLIAM J. BRADY, JR.

Sworn to and Subscribed
Before me this 22nd day
of June, 1973.

Notary Public
EVA ROBERTS

Notary Public, Philadephia, Philadelphia Co.
My Commission Expires April 24, 1975.

APPENDIX E

SUPREME COURT OF PENNSYLVANIA
Eastern District

PATRICK N. BOLSINGER
PROTHONOTARY
GEORGE W. DUNN, JR.
DEPUTY PROTHONOTARY

Philadelphia 19107

September 12, 1973

Milton M. Stein, Esq.,
Assistant District Attorney
Chief, Appeals Division
22nd Floor—Five Penn Center Plaza
Phila., Pa. 19103

In re: Commonwealth of Pennsylvania,
Petitioner v. Warren Felton
No. 1044 Allocatur Docket
(Nos. 58 and 59 October Term 1973)

Dear Mr. Stein:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from the Judgment of the Superior Court, in the above captioned matter:

"September 10, 1973

Petition Denied

Per Curiam."

Yours very truly,

Prothonotary

PNB:mb

CC: William J. Brady, Jr., Esq.